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IN THE

Supreme Court of the United States

October Term, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, and FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents,

v.

HARRY J. ALKER, JR. and MAMIE DU BAN, Individually and as EXECUTRIX OF THE ESTATE OF ALFRED A. DU BAN, DECEASED,

Petitioner.

PETITION FOR LEAVE TO FILE THIRD PETITION FOR REHEARING AND THIRD PETITION FOR REHEARING.

HARRY J. ALKER, JR.,
1505 Land Title Bldg.,
Philadelphia 10, Pa.,
Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143

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HARRY J. ALKER, JR., and MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED.

Petitioner.

PETITION FOR LEAVE TO FILE A THIRD PETITION FOR REHEARING FOR ALLOWANCE OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Harry J. Alker, Jr., hereby asks leave of your Honorable Supreme Court to file a Third Petition for Rehearing of his original Petition for a Writ of Certionari to review the Judgment of the United States Court of Appeals for the Third Circuit in the above captioned case, and assigns therefor the following reasons:

Your petitioner filed a Petition for Rehearing in the above matter with your Honorable Court on November 15, 1963, which petition was refused on December 9, 1963, and your petitioner filed a Petition for Leave to File a Second Petition for Rehearing in the above matter with your Honorable Court on December 27, 1963, which petition was refused on March 2, 1964.

Besides *Prime Federal* questions of nation-wide importance involved herein and previously referred to, is the question and necessity of upholding that sacred concept, "Equal Justice Under Law" to all citizens including the petitioner.

This instant and immediate petition for leave to file a Third Petition for Rehearing is an appeal to this Honorable Supreme Court so that it may, in all fairness, justness and equity, right a great wrong done to the petitioner by a Federal Agency, to wit, the Federal Deposit Insurance Corporation.

Your petitioner feels, believes and claims that he is in the same or similar position as was William L. Greene, plaintiff, in the case of *Greene v. United States*, 11 L. Ed. 2d 576, where this Honorable Court held that Mr. Greene was entitled to be made whole for his losses by the Federal Government that caused them.

The "New York Times" newspaper on February 21, 1964, editorialized on this Court's action in the Greene matter as follows:

"ELEVEN YEARS TO JUSTICE -

"Eleven years ago William L. Greene of Annapolis, Md., was labeled a security risk by the Navy and forced out of his job as vice president of a company with defense contracts. Without a security clearance he could get no work in his professional field, aeronautical engineering, nor could he find out who thought he was a man of suspicious views. The Government would not disclose the names of its 'confidential informants.' Mr. Greene sued.

"In 1959 the Supreme Court held that the Navy had no authority to deprive a man of his livelihood by such unfair methods. By then, six years after his removal, Mr. Greene had lost touch with aeronautical engineering and was in the building business. He therefore did not ask for a new security clearance, but he did seek compensation for his lost salary. The Government said it would pay him nothing unless he could prove, in a new hearing, that he should have been cleared originally... Mr. Greene sued again.

"This week the Supreme Court decided a second time in Mr. Greene's favor, holding that he was entitled to be made whole for his losses by the Government that had caused them. The decision is a footnote to the history of an unhappy period when men's reputations and livelihoods were destroyed on unsupported suspicion.

"But the case speaks to the present as well as the past. Why should the Government have to be sued to right so obvious a wrong? It is fortunate that we have a Supreme Court to correct such governmental indifference or niggardliness, but not every victim will have the tenacity of William L. Greene to fight on for eleven years."

Petitioner contends and claims that if there was ever a case in which justice required a reconsideration and opening of the matter, it is his present and instant one.

Again, on March 6, 1964, the "New York Times" editorialized on the sacred concept, "Equal Justice Under Law" (*United States v. Roy M. Cohn*).

The newspaper in its editorial states, "* * * What must be upheld in this or any other case is the sacred concept carved above the Supreme Court's pillars: 'Equal Justice Under Law.' That applies to a James Hoffa, who stands for the worst in trade union leadership, or to a Roy Cohn, who helped write the book on how to abuse wit-

nesses when he served as the late Senator McCarthy's closest assistant and confidant. That fundamental idea was expressed long ago by Justice Brandeis: 'At the foundation of our civil liberty lies the principles which deny to Government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen * * *.' ''.

Here in the instant case the petitioner alleges that the acts and actions of the Federal Deposit Insurance Corporation and its officers and employees were improper, unlawful, arbitrary and capricious. In addition thereto, petitioner alleges he has not been given equal protection of the law and due process as provided by the Fifth Amendment to the Constitution of the United States, nor received just compensation for his property taken by a Federal agency.

Petitioner contends it was never the intention of Congress to give to the Federal Deposit Insurance Corporation a stronger position than the State Bank had where it takes over from the State Bank an obligation. *Congress always intended any legal agreement with the State Bank as to the obligation should, in the absence of fraud, be binding on the Federal Corporation.*

The effect of the present decision if it is allowed to stand is to hold the Federal Deposit Insurance Corporation was not bound by the State Bank's agreement.

This is an important federal question and one that would affect any one who did business with the Federal agency.

It is vital to the public interest as well as the petitioner that the matter be reopened, a full trial held and the matter be properly decided.

A perusal and study of the history of the Federal Deposit Insurance Corporation's actions in this matter can only lead one to a sole conclusion that the petitioner has been greatly and improperly injured and damaged by the results found in this case, and a great injustice has been done.

The facts disclose that in 1931 petitioner, Harry J. Alker, Jr., had a loan of $592,150.00 with the Integrity Trust Company of Philadelphia, Pennsylvania, for which he had put up security collateral with the bank as well as his note payable. Among such collateral were 3400 shares of stock of the National Dairy Products Corporation owned by his friend, Alfred A. DuBan, and loaned to him for that purpose. As petitioner's collateral became worth less than the required amount, in 1931, the Integrity informed petitioner that it required additional collateral be put up by him to better secure his loan. Petitioner approached his friend, DuBan for a loan of more National Dairy stock and Mr. DuBan and Mr. Alker, after various conferences with the bank's President and other officers, came to an agreement with the Integrity that he, Mr. DuBan, would put up an additional 1000 shares of National Dairy stock with the Integrity, provided Mr. Alker's account would not be disturbed; that Mr. Alker would put up additional life insurance of $100,000.00; assign certain large legal fees due him from the Commonwealth of Pennsylvania, and would pay the interest on the loan regularly as well as paying the insurance policy premiums regularly; and the Integrity in turn would not disturb the Alker account. That was the agreement and the Integrity and Mr. Alker and Mr. DuBan carried out faithfully the terms provided thereby.

Subsequently the Trust Company put a time limit of five years on the agreement and then a ten-year limit. *It had over three years to run when the loan was called. There was no default.*

The fees mentioned above owed to petitioner by the Commonwealth of Pennsylvania were not assignable; nevertheless petitioner arranged for them to be paid to the Integrity and they totalled a very substantial amount.

Later, near 1940, the Integrity began suffering hard times and became in an unsatisfactory position and twelve Philadelphia banks, six of them being Pennsylvania state banks and the other six being National banks, deposited,

subject to certain unknown restrictions as to repayment, some $9,000,000.00 in the Integrity, in an endeavor to help it survive.

However, the Integrity was not able to do so, and applied for a loan from the Federal Deposit Insurance Corporation. On or about January 13, 1940 the Federal Deposit Insurance Corporation made a loan of $21,000,000.00 to the Integrity, and the Integrity, in turn, pledged and assigned all its assets including petitioner's note and collateral to the Federal Deposit Insurance Corporation.

Prior to the consummation of said Federal Deposit Insurance Corporation loan, the said twelve banks executed an unknown secret agreement with the Federal Deposit Insurance Corporation (dated **January 2, 1940**), which was not known to petitioner until March 5, **1947**, when the Federal Deposit Insurance Corporation published the results of its liquidation of the Integrity Trust Company. In so many words, the F. D. I. C. was acting as a collection agency for the benefit of and to protect the said Philadelphia banks.

This secret agreement provided that the said twelve banks would turn over to the Federal Deposit Insurance Corporation $3,000,000.00 of its deposits, free and clear of any offset, counterclaim or reduction of any kind or character, and the Federal Deposit Insurance Corporation, in turn, after it had collected and indemnified itself up to a certain amount of its loan, would then first pay to the twelve associated banks its loans and deposits before payment to other depositors and creditors. A copy of said agreement is contained in appellant's Brief and Appendix (pages 25a to 35a).

Immediately after the Integrity was taken over by the Federal Deposit Insurance Corporation, petitioner called upon its liquidator in Philadelphia and apprised him of the agreement with DuBan, himself and the Integrity, and its terms. The Federal Deposit Insurance Corporation liquidator went along with petitioner on the terms of the said agreement and petitioner faithfully carried out all of

his commitments, paying thousands of dollars in interest and premiums respectively on said loan and insurance policy, and turning over the assigned fees as received.

Then in January 1943 the Federal Deposit Insurance Corporation without any cause, arbitrarily, unlawfully and capriciously called petitioner's loan and sold his securities at a purported "public sale" which, petitioner contends, was illegal. The Alker securities were bought in by the Federal Deposit Insurance Corporation for $358,336.50, forcing petitioner to incur a great loss thereon. It is to be noted that petitioner, not recognizing the purported sales as being a lawful one, tendered his interest regularly for years thereafter.

The F. D. I. C. accepted the interest for two months after said sale. At the end of said two months the F. D. I. C. discovered what it had done and attempted to apply the two payments on principal.

Petitioner, however, did not recognize the alleged sale or the alleged calling of the loan and continued regularly to tender the interest for years and maintain the insurance.

The Federal Deposit Insurance Corporation then instituted an equity suit in the United States District Court for the Eastern District of Pennsylvania to establish a deficiency against Alker. As a result of said suit, the Federal Deposit Insurance Corporation received a judgment of $108,236.89 against Alker.

The Federal Deposit Insurance Corporation in its complaint and amended complaint against petitioner in said suit brazenly and unlawfully took the position that it was a holder in due course of petitioner's note and an alleged lender without notice, this in spite of the fact that it had accepted petitioner's thousands of dollars of interest and checked regularly Alker's payments of his life insurance premiums and assigned fees. The petitioner claims that the Federal Deposit Insurance Corporation had only the same rights in Court as any other litigant and should have been so treated instead of having been favored therein.

Arbitrary, capricious and unreasonable action is not due process of law. *Rudder v. United States*, 226 F. 2d 51.

A deprivation of liberty to which the Government is a party, is unconstitutional when it is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. *Polla k v. Public Utilities Commission of District of Columbia*, 191 F. 2d 450.

Arbitrary discrimination between persons in similar circumstances is a denial of due process. *Wallace v. Currin*, 95 F. 2d 856, affd. 306 U. S. 1.

The petitioner claimed and proved Federal Deposit Insurance Corporation was not a holder in due course of his note but was only an assignee and pledgee subject to all of his set-offs and counter-claims against the Integrity.

Unfortunately, however, this question was not decided by the lower Courts, and petitioner contends and requests herein that he should be given such a new hearing to have all of his rights decided by the trial Court. He states again that he has proved by competent evidence that he had a valid, lawful agreement with the Integrity Trust Company and that the Integrity Trust Company and its assignee Federal Deposit Insurance Corporation or either of them could not call his loan as long as he carried out the terms of their agreement (which he did faithfully). *That this transaction was found by the District Court trial judge to be free of fraud.*

Chief Bank Examiner Matsinger deposed that, in his opinion, it was good business for the Integrity to make such an agreement. By it the Integrity got a considerable amount of collateral and protection, all of which operated to the benefit of the bank and public as well as the Federal Deposit Insurance Corporation. That there was nothing done that could be construed to deceive the creditors or public authority or would tend to have that effect (49a of Off. Brief C. C. of A.).

As to any delay alleged in this matter to bring the case to a summation, much time was necessary in obtaining the

testimony of witnesses Pellini and Santa Marie. Pellini was serving in the United States Army overseas at the time of trial and, although Santa Marie was present to testify at the trial as to the terms of the said Alker-DuBan-Integrity agreement, the trial judge refused to hear his testimony in error, and then Mr. Santa Marie moved to California and his whereabouts were unknown for a long time. Also, your petitioner is aproximately 79 years of age, and was ill and hospitalized a great deal of the intervening time, being in three different hospitals and having undergone two serious operations.

Petitioner further contends and alleges that there was a misinterpretation by the hearing Judge of the District Court Judge's order as to what witnesses could testify at the meeting before him for taking depositions of further testimony in the case. He restricted it to new witnesses and not new evidence, eliminating witnesses who had previously testified but would have given new testimony of material facts, which was vital to petitioner's case. These witnesses should be permitted to give this evidence and to present the same. Refusal to permit the same was certainly a denial of due process.

Petitioner requests this Honorable Court to note that the President of one of the plaintiffs herein, Fidelity-Philadelphia Trust Company, had full knowledge of petitioner's agreement with the Integrity Trust Company at all times and the fact that the state banks should be subject to state law. Mr. Gest, the President of the Fidelity was chairman of the Integrity Finance Committee and frequently asked for a report as to Alker's loan.

Petitioner further claims that he should have received a just compensation and value for the illegal taking of his property by the Federal Deposit Insurance Corporation. That what it did was improper, unlawful, arbitrary and capricious, and that it should have made him whole for the unlawful sale of his collateral let alone to give the Federal Deposit Insurance Corporation an additional judgment of

some $108,000.00. That he is entitled to same under his constitutional rights and privileges, as this property was unlawfully appropriated by a Federal Agency; that he should be put in as good a position, at least, pecuniarily as he would have occupied, if his property had not been sold, out of all fairness and equity. That the Federal Deposit Insurance Corporation came into Court with unclean hands when it claimed and pleaded it was a holder in due course of petitioner's note when in fact it knew that it was only an assignee with much less rights. That it should not have been permitted to obtain this "unjust enrichment" by the use of such improper means. The loan had three years to run and during that time petitioner would have paid same and lifted the collateral.

It is finally contended by petitioner that out of all fairness, justness and equity, all the facts of this matter should be heard and a decision rendered thereon, and that this can only be done by granting him a new trial where *all* the accumulated evidence can be presented and all the witnesses produced at the trial and, in addition thereto, *that the question of whether state or Federal law should apply herein also be resolved thereby, so that Equal Justice will be done to all.*

A great wrong has been done petitioner and equal justice requires its correction which can only be done by a full new trial of the matter at which all the evidence may be presented at the same time.

Petitioner respectfully prays that this Honorable Court help rectify the great wrong done him by granting him leave to file his Third Petition for Rehearing.

Respectfully submitted,

Harry J. Alker, Jr.

HARRY J. ALKER, JR.,
1505 Land Title Building,
Philadelphia, Pa.,
Petitioner.

ORDER.

AND NOW, , 1964, leave is granted the petitioner to file a Third Petition for Rehearing of the Petitioner's Petition for the Issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit in the above entitled case.

By THE COURT:

.....

J.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 342.

FEDERAL DEPOSIT INSURANCE CORPORATION, TO THE USE OF SECRETARY OF BANKING, RECEIVER OF INTEGRITY TRUST COMPANY, TO THE USE OF BUTCHER & SHERRERD, AND FIDELITY-PHILADELPHIA TRUST COMPANY, TRUSTEE,

Respondents.

v.

HARRY J. ALKER, JR. AND MAMIE DuBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DuBAN, DECEASED.

Petitioner.

THIRD PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Harry J. Alker, Jr., prays that this Court, rehear and reconsider its denial of the petitioner's petition for the issuance of a writ of certiorari to review the action of the Circuit Court of Appeals for the Third Circuit in the above entitled case, and

RESPECTFULLY REPRESENTS

On August 6, 1963, your petitioner filed with your Honorable Court a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit.

On October 21, 1963 your Honorable Court denied the petition for certiorari.

On November 15, 1963, your petitioner filed with your Honorable Court a petition for rehearing, which was denied December 9, 1963. On December 27, 1963, your petitioner filed with your Honorable Court a second petition for leave to file a petition for rehearing which petition for leave was denied March 2, 1964.

The history of the case, questions presented, the statutes and law involved, the specifications of errors, and nearly all the reasons for granting the writ are partly set forth in the petitions for certiorari and briefs in support thereof and the subsequent motion and petition for rehearing, to which reference is made as well as the record and will not be repeated here, they being hereby made part of the record, if they have not already been so made. Additional reasons are set forth herein.

Reference is also made to the record, the various petitions and briefs filed in this matter with your Honorable Court as of October Term, 1945, No. 880, which contain further reasons why the writ should be allowed, and they are made part hereof by way of reference.

The questions and reasons given by petitioner in his Petition for Leave to File a Second Petition for Rehearing are also referred to and incorporated herein by said reference. All of the reasons given in the Third Petition for Leave to File this Third Petition are referred to and incorporated herein as part of this petition.

This is an equitable action. Neither equity nor justice has been done.

Alker had this loan which was taken over by the Integrity Trust Company, an agreement made, Mr. DuBan deposited more stock on certain conditions. In addition to the securities, Alker gave the Federal Deposit Insurance Company insurance, and assigned various fees.

The record shows he kept his part of the agreement meticulously and at great sacrifice. The Federal Deposit

Insurance came into the picture and claimed it was the owner of the obligation. The Bank Examiner testified the Examiners knew about the agreement connected with the loan, and thought it a good one. Alker, after the Federal Deposit Insurance Corporation claimed it owned the note, kept his part meticulously. This took place for several years. Then, suddenly, when there was no default and the loan had several years to go, the Federal Deposit Insurance called the loan and claims it sold the collateral. The National Dairy refused to transfer the DuBan stock as it was advised there was no default. This proceeding was then instituted by the Federal Deposit Insurance Corporation, who claimed it owned the note and there was a default. Alker and National Dairy defended. Alker was incapacitated. When suit was first sought, all the evidence and witnesses were not available. Long litigation followed. Judge Welsh, the trial Judge, finally granted a new trial.

All sorts of proceedings were tried by plaintiffs. First one objection was interposed after another. As, after great difficulty, each one was met, the Court of Appeals sent it back for trial subject to certain conditions after having first refused a new trial and only granting it when its action in interfering was greatly criticized by various law reviews, who felt it should not have interfered but should let Judge Welsh retry the case and the objections, and then come up on appeal. This caused a lot of delay.

All of this is stated so the Court can see why it has taken so long.

As the Courts constantly have stated, time cannot count when equity and justice are involved.

As to the prolongation of the proceeding.

The plaintiffs apparently abandoned their stand that there was no time fixed for the fulfillment of the obligation which they had always taken heretofore inasmuch as witnesses were produced showing first it was five years and then ten years.

They now stress the time the litigation has extended and there must be an end to all litigation.

The Court's attention is called to the difficulty in locating the witnesses and ascertaining who they were; one such witness, John Pellini, was absent in the Army in combat duty for three years. Mr. Santamarie had left this territory and was in the far West. He was finally located and, promptly on his return, his testimony was taken. The records shows that Alker was a sick man for a long time, and unable to work.

This is an equitable proceeding in which justice had not been done, and the many steps show that the proceeding was carried on as fast as it could.

As to definite time for payment of note heretofore claimed by F. D. I. C.—not now claimed.

Heretofore the Federal Deposit Insurance Corporation claimed, and the District Court so found, the agreement was void because it claimed no time limit was fixed. Two disinterested witnesses were later produced—one John Pellini, who had been office manager of petitioner for many years, and who was absent from the country in combat duty in the United States Army for a long time, returned to Philadelphia, and his evidence was taken; to wit, that the Bank officials had notified him they were extending the loan first for five years and they required a life insurance policy for that term on petitioner, and then, at the end of that period, that it was being extended for ten years and must have insurance for that term; that they had him come to the Bank and get the new note, get it signed, and brought back to the Bank. Then Petitioner produced L. J. Santamarie who had moved to California and lived there a long time. He was located and returned to Philadelphia. He was in the life insurance business. The Bank official in charge told him they were making (first) a five year loan and must have a policy for that term to cover. They ordered him to place it, which he did. At the end of that time the Bank

official in charge advised him they were extending the loan for ten more years and must have a new policy for that term; he placed a new policy for the ten years and sent it to the Bank, and the bill to Petitioner. Both witnesses testified they were advised by an officer of the Bank of the definite extensions of Alker's loan.

This eliminated the contention as to definiteness of time of the loan. Neither Federal Deposit Insurance Corporation nor the use plaintiffs have now raised it.

As to time element in discovering the F. D. I. C. agreement with 12 state banks.

It was not until years after the suit was brought that the Federal Deposit Insurance Corporation announced in the newspapers it held the obligation for twelve state banks. This changed the picture as the State Banks would have no standing in the Federal Court. It came as a great surprise. It was a clear misrepresentation as it had always claimed it was the owner. The Federal Deposit Insurance Corporation tried to take advantage of this.

The Third Circuit Court of Appeals had recently decided in *Publicker v. Shallcross*, 106 F. 2d 949, that where there has been fraud or misrepresentation, time did not enter a matter, but it opened the matter anew. This would be true as to the present suit. As stated, the Federal Deposit Insurance Corporation had always claimed it had taken an assignment of Alker's obligation and owned the same.

Time therefore was out of the question in this equitable action.

As to DuBan.

The record clearly shows that when Mr. DuBan deposited with the loan the last 1,000 shares of National Dairy Products Corporation common stock, he did so on condition that the loan should be extended and Alker's securities should be held until the Bank gets its debt, DuBan's securities were returned to him and Alker's situa-

tion was worked out. He would not leave the stock until the Bank agreed to it. The Bank agreed to it. The record shows this; no one disputed it. The Federal Deposit Insurance Corporation alleges it sold the collateral. It did so when there was no default. The plaintiffs should not be permitted to keep the proceeds of DuBan's stock if it broke the agreement. His stock, or whatever represents it, should be returned to him. It had no authority from him to sell the stock under the circumstances.

As to one-year rule.

The first Motion for a new trial was filed within the proper time and within the required terms, was timely filed, and that his subsequent motions for a new trial referred to and incorporated in these said provisions of the first motion, and therefore a one-year rule should not restrict the appellant in this instant case.

As to fraud.

The Court below found there was no fraud.

As to affidavits by Bank Examiners as to Knowledge of Agreement by Examiners, Discussion of same with officers of Bank, other examiners.

The State Bank examiner who examined the Bank with a Federal Bank Examiner and Federal Deposit Insurance Examiner, made three affidavits—the first in the office of the late Justice Owen J. Roberts (p. 47a) and then more affidavits, all of which are in the record. He testified that the executive officers of the Bank confirmed to the examiners that the agreement as to the Alker loan existed and the provisions thereof. They advised Examiners that Alker was living up to his agreement scrupulously and that the Bank therefore had to live up to it.

He testified the Examiner for the Federal Reserve Bank was present in 1937, 1938 and 1939, and the Examiner for the Federal Deposit Insurance Corporation was present

in 1939. He testified it was good business for the Bank to make such an agreement.

He testified nothing was done that could be construed to deceive, or be designed to deceive, the creditors or the public authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled. He testified the executive officers of the Bank confirmed to the Examiners that the agreement did exist, and the terms of the agreement, that nothing was done that could be construed to deceive or be designed to deceive, the creditors or the public authority, or would tend to have that effect; that there was no undisclosed or fraudulent arrangement. See Matsinger affidavit, Page 23.

The *D'Oench Duhme* case does not therefore apply.

See letter of Justice Roberts, Page 26.

As to Alker's execution of agreement terms.

The record shows the Federal Deposit Insurance Company admitted there was no default by Alker; the interest paid, the insurance maintained, the assigned fees as received paid. The record shows it also held the insurance as testified to.

Alker claims the alleged sale was illegal as the loan had several years to run and there was no default. Since then petitioner has learned the use plaintiffs a few years ago cashed the insurance and have received, according to the insurance company, $36,900.

As to the F. D. I. C. lending the Integrity Bank an amount greatly in excess of the insured accounts.

Testimony of S. Herman Hall, Liquidating Officer of F. D. I. C.

Page 81(a) Notes of Testimony:

"Q. Where a deposit was for more than $5,000.00 they didn't pay over that amount—they only paid up to that amount?

A. They paid all deposits regardless of amounts.

Q. They did pay all deposits?

A. A million dollars as well as five thousand dollars.

Q. The Federal Deposit Insurance Corporation did?

A. They did.'"

As to misconstruction by Judge Layton of orders of Court of Appeals.

In authorizing the new trial by the Court of Appeals the Court intended the Trial Judge to consider new evidence. Judge Layton misconstrued that and restricted petitioner to witnesses who had not testified before. There were witnesses who had testified before but who had additional evidence not theretofore given but important to a right decision of the case. This makes it important that a new trial be granted at which the parties may have *all* their witnesses present who will give all the evidence then at one hearing and the Judge will have all the facts. This is vital and Judge Layton's action was a serious error.

Apropos of our averment that Judge Layton erred by misinterpretation of Rule 60(b), attention is directed to his *error of omission* which could have been inadvertent, but is more apt to have been designed. In his opinion (p. 16a of petitioner's C. C. A. brief), Judge Layton correctly quotes Rule 60(b) in toto and verbatim. But when he tries to dispose of petitioner's new trial motion by process of elimination, the learned jurist deliberately omits the *cogently pertinent* part of Rule 60(b)(5), and quickly skips to the inapplicable generalities of 60(b)(6).

More precisely, subdivision (5) of Rule 60 shows that the *one-year limitation on* filing motions for a new trial *does not apply* when "(5) the judgment has been satisfied, released, or discharged, or a prior judgment . . . has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application.*"

When, however, Judge Layton came to discuss clauses 4, 5, and 6 of Rule 60(b)—(Vide p. 17a of petitioner's C. C. A. brief) he hurried over clause (5), as follows:

> "Defendants have offered no evidence to prove that the judgment is void (clause 4), or that the judgment has been discharged, or satisfied (clause 5). The inquiry is thus greatly narrowed."

Note well, if you please, that he, Judge Layton, is the one who *thus straitened it*, and *not* Rule 60(b)(5). His Honor, Judge Layton, *refrained* from even mentioning his *most germane reason* stated in said clause 5, viz.:

> *"or it is no longer equitable that the judgment should have prospective application . . . ."*

Yet, *this is exactly the reason given by the trial judge*, Hon. George A. Welsh, for his granting a new trial to defendant-petitioner in his opinion, dated November 3, 1955 (pp. 13a, 14a of C. C. A. brief), wherein he said:

> "In our judgment *justice and equity require that defendant*, Alker, *have an opportunity to submit this type of evidence* so that any facts elucidated may be embodied in the findings of fact and conclusions of law in any opinion subsequently filed in the case. The discretion and latitude allowed a trial judge . . . must . . . be exercised . . . *with a conscientious feeling as Chancellor that these additional witnesses should be heard . . . at a new trial* . . . ." (Emphasis ours.)

Thus was it brought squarely within that *pertinently cogent phrase* of clause 5, Rule 60(b) which his Honor, Judge Layton, so conveniently avoided. Hence we strenuously urge that the learned substitute, Judge Layton, gravely erred in his zeal to vindicate the prior errors of the learned Court of Appeals (in issuing mandamus and prohibition which they later vacated) by specifically skipping

the apposite phrase of clause 5, and hastening to assure the legal world that clause 6 of Rule 60(b) did not warrant a new trial for the petitioner. Judge Welsh had granted said new trial under clause 5 of Rule 60(b), and it is respectfully insisted that the gross error of his Honor, Judge Layton, was merely compounded further on the affirmance thereof entered by the learned Court of Appeals below. The only method for the correction of these grave errors, which so obviously affect the proper interpretation of Rule 60(b), F. R. C. P., on a nation-wide scale, is by issuance of the Certiorari from this Honorable Supreme Court as prayed for herein.

As to Fidelity-Philadelphia Trust Company, Use Plaintiffs.

Inasmuch as the record clearly shows that Mr. William P. Gest, President of the Fidelity-Philadelphia Trust Company, was chairman of the Executive Committee of the Integrity Trust Company; that the matter of the Alker loan came regularly before the said Executive Committee, that Mr. Gest, who knew Alker, frequently asked whether Mr. Alker was keeping his part, and, when advised that Alker was, the record shows Mr. Gest said if Alker was, the Integrity must. This is an equity case. In view of Mr. Gest's connection with both companies and his familiarity with the whole transaction, the Fidelity Trust Company is estopped from claiming the agreement was illegal and not binding and therefore its claim should be dismissed.

Was the F. D. I. C. bound by the terms of the loan by the Integrity Trust Co., of which loan it became assignee? The Court should pass on this important question which has not been passed on in this case, and is a vital one.

If there ever was a case in which equity and justice required that Alker and the DuBan Estate be granted a new trial, this is it.

The Court should grant a certiorari and pass on this question, or it should refer the matter back to the District Court for a retrial at which all the witnesses and evidence should be presented, and in which Judge Welsh who knew the case from the start could at least sit in.

The matter is one of public importance.

CONCLUSION:

It is contended by the Appellant that he has a meritorious defense to the action against him and that he has clearly established misrepresentation and fraud and a great injustice and wrong has been done. Therefore, the relief requested by him should be granted by this Honorable Court and the judgment set aside, the case reopened, a full trial given him where all the witnesses may be in Court together and testify to all of the facts of which they now have knowledge, irrespective of whether they testified heretofore or not, at which time the validity of the alleged cancellation by the Federal Deposit Insurance Corporation of his loan may be decided as well as in the event it is decided the alleged cancellation of the Alker loan by the Federal Deposit Insurance Corporation is invalid, then to determine the liability of the Federal Deposit Insurance Corporation arising thereout.

Respectfully submitted,

Harry J. Alker, Jr.

Harry J. Alker, Jr.,
1505 Land Title Bldg.,
Phila. 2, Pa.,
Petitioner.

It is hereby certified that the preceding 3rd petition for Rehearing is presented in good faith and not for delay; and is restricted to the grounds above specified.

Harry J. Alker, Jr.

Harry J. Alker, Jr.,
Petitioner.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.:

I, C. B. MATSINGER, of 101 West Fifth Avenue, New York City, being duly sworn according to law, deposes and says:

I was a bank examiner for the State of Pennsylvania from November 1, 1929, to November 15, 1943. After that I engaged in the banking business until March 1, 1947, at Easton, Pennsylvania, since which time I have been in business in New York.

While a Pennsylvania state bank examiner, I examined the Integrity Trust Company, a Pennsylvania state banking institution, during the years 1937, 1938 and 1939. My examination was made contemporaneously with and in conjunction with the examination made by the Federal Reserve Bank in 1937 and 1938 and both the Federal Reserve Bank and the Federal Deposit Insurance Corporation in 1939. We examiners worked together in the examination. During the said examination, joint conferences were had by all the examiners with the executive officers of the bank in relation to matters requiring special attention. One of the matters which we discussed with the officers was the loan of Harry J. Alker, Jr., which was the second largest loan in the bank.

The collateral with this loan was rather unusual because it consisted of not only securities belonging to Mr. Alker and those of some friends but also of an insurance policy in the amount of $125,000 on the life of Mr. Alker, payable to the Trust Company together with an assignment of certain large legal fees due to him from the Commonwealth of Pennsylvania. The very presence of this unusual type of collateral was notice to me that there must be some kind of agreement in existence in connection with the loan, even if the officers had never said anything to me about the agreement. The presence of this unusual col-

lateral was a record by the bank that an agreement existed as to the loan.

But the executive officers of the bank would not let the matter rest and they actually confirmed to the examiners that the agreement did exist with Mr. Alker as to the loan and that the bank had entered into the agreement with Mr. Alker, which provided, among other things, that he should maintain the insurance for the term of the policy which the bank placed and pay over to the bank the assigned fees as received, pay the interest on the loan and reductions as he could. They informed us that there was some question as to the right of the bank to collect fees directly from the (fol. 48) Commonwealth earned by Mr. Alker, as the Commonwealth would not recognize assignments, and by making the agreement with Alker and living up to it the bank was sure it would get the fees, which were substantial. They advised us that Mr. Alker was living up to his agreement scrupulously and that the bank therefore had to live up to its agreement. I remember this very distinctly, as this loan was one of the largest in the Integrity and, as I said before, I examined the Integrity several times. The examiner for the Federal Reserve Bank was present in 1937, 1938, and 1939 and the examiner for the Federal Deposit Insurance Corporation was present in 1939.

I have seen copies of the original notes of Alker of 1931 and in my opinion the notations on these notes clearly refer to the Alker, DuBan agreement and the 1936 note clearly shows by the provision inserted at the bottom, a confirmation and extension of that agreement. These notes with the notations on them together with the unusual collateral for surety were all records of the Integrity Trust Company and showed that there was no secret about the matter.

The Federal Deposit Insurance Corporation made no examinations of the Integrity Trust Company until 1939 when they made a joint examination in connection with the state and Federal Reserve examiners.

In my opinion as a banker and a bank examiner of many years' experience, the presence of said term policy and the assignment of fees, together with various other collateral in other peoples' names, accompanied by powers to pledge constituted a record of the bank that such an agreement existed.

In my opinion, it was, furthermore, good business for the bank to make such an agreement. By the agreement the Integrity got a considerable amount of collateral and protection, all of which operated to the benefit of the bank and the public as well as the Federal Deposit Insurance Corporation. In my opinion nothing was done here that could be construed to deceive, or be designed to deceive, the creditors or the public authority, or would tend to have that effect.

There was no undisclosed or fraudulent arrangement. The records of the Integrity Trust Company clearly showed there was no misrepresentation or misstatement as to the Alker loan which was an asset in the portfolio of the Integrity Trust Company. The note was not designed to deceive the creditors or the public authority and would not tend to have that effect. There was no scheme or arrangement (fol. 49) whereby the banking authority, on which the Federal Deposit Insurance Corporation relied in insuring the Integrity Trust Company, was or was likely to be misled.

(Sgd.) C. B. MATSINGER.

Sworn to and subscribed before me this 9th day of August, A. D. 1949.

(Sgd.) J. J. BUCHANAN,
Notary Public.
My commission expires Feb. 1, 1953.

(Seal)

OWEN J. ROBERTS
1510 Morris Building
Philadelphia 2, Pa.
RIttenhouse 6-0650

November 30, 1950

Hon. D. Emmert Brumbaugh
Secretary of Banking
Harrisburg, Pennsylvania

Dear Mr. Brumbaugh:

Sometime ago Harry Alker consulted me about the action in the United States Court by the Federal Deposit Insurance Corporation against him and the DuBan Estate.

At that time the Circuit Court of Appeals had held the agreement made by Alker and DuBan with the Integrity Trust Company was not binding on the Federal Deposit Insurance Corporation, basing its opinion on the case of Federal Deposit Insurance Corporation vs. D'Oench, Duhme & Co., Inc., 315 U. S. 447, which was a fraud case, and citing a criminal section of the Federal Reserve Act. The District Court had held in the Alker-DuBan case there was absolutely no fraud.

I advised Harry that in my opinion the D'Oench, Duhme decision and the Criminal Section of the Federal Reserve Act were never intended to apply to anything but a fraud case and that therefore I was of the opinion he was entitled to a new trial. I thought a great wrong had been done him in the matter because there was no default in interest, Harry having completely performed his part of the agreement in all respects, which agreement the F. D. I. C. had adhered to for almost three years.

I have not changed my mind in this respect and am still of the opinion that a new trial should be granted him.

I understand the Attorney General's office and you have gone into the matter and you likewise feel that this should be done.

I therefore hope you will see your way clear to consent to it.

Yours sincerely,

OWEN J. ROBERTS

OJR:Sy